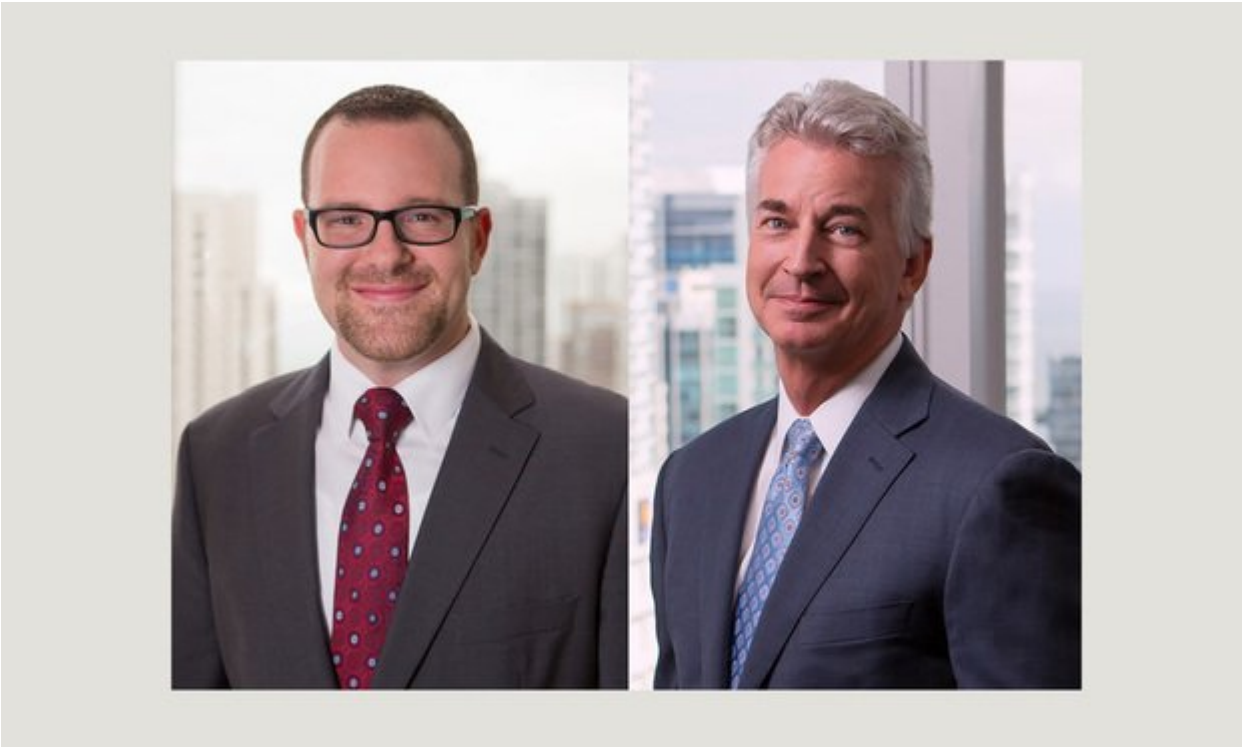
Sixth Circuit: Section 1782 Applies to Private Commercial Arbitration

Section 1782 allows foreign litigants to obtain evidence through a federal U.S. district court "for use in a proceeding in a foreign or international tribunal."

By **Jorge D. Guttman and William K. Hill** | December 10, 2019



Jorge D. Guttman (left) and William K. Hill (right) shareholders with Gunster.

"Thomas Jefferson once counseled his nephew Peter Carr on how to think: 'Fix reason firmly in her seat, and call to her tribunal every fact, every opinion.'"

With this opening quote, the U.S. Court of Appeals for the Sixth Circuit, in *Abdul Latif Jameel Transportation. v. FedEx*, 939 F. 3d 710 (6th Cir. Sept. 19, 2019), proceeded to extend the applicability of Section 1782 of Title 28 of the U.S. Code (Section 1782) to a private commercial arbitration.

But first things first: what is Section 1782? It is one of the lesser known but most powerful tools available to parties in litigation outside the United States.

Section 1782 allows foreign litigants to obtain evidence through a federal U.S. district court "for use in a proceeding in a foreign or international tribunal." Specifically, Section 1782 allows an interested person (such as a foreign litigant) to apply for discovery over a person or entity found in the U.S. district (where the court sits) for use (https://www.law.cornell.edu/uscode/text/28/1782) in a proceeding in a foreign or international tribunal. (https://www.law.cornell.edu/uscode/text/28/1782) Prior to granting a Section 1782 application, however, a federal court will also consider the four discretionary factors enumerated in the U.S. Supreme Court decision in *Intel v. Advanced Micro Devices,* 542 U.S. 241 (2004).

These factors are: whether the person from whom discovery is sought is a participant in the foreign proceeding (because there may be no need for U.S. judicial intervention where the foreign tribunal itself can compel parties to produce evidence); the nature of the foreign tribunal and the character of the proceeding abroad, including whether the foreign government or the court or agency is receptive to U.S. federal court assistance; whether the request is an attempt to circumvent proof-gathering restrictions or policies in the foreign jurisdiction where the litigation is pending; and whether the request is unduly intrusive or burdensome.

Although the availability of Section 1782 discovery for use in foreign courts is generally undisputed, U.S. courts have found that not all international arbitrations qualify under this statute. In this regard, courts have permitted Section 1782 to be

used in connection with investor-state arbitration, but have grappled with whether to apply the statute in the context of private, commercial arbitration.

In *Abdul Latif,* the Sixth Circuit held that Section 1782(a)'s reference to a foreign or international tribunal included a private commercial tribunal based in the United Arab Emirates under the rules of the Dubai International Financial Centre-London Court of International Arbitration. In reaching this conclusion, the Sixth Circuit focused on the ordinary meaning of the word "tribunal," and noted that neither "foreign tribunal" nor "international tribunal" are terms of art. The court's common-sense and pragmatic approach included citing to dictionary definitions as support for the conclusion that the word "tribunal" includes private arbitration panels.

The impact of the Sixth Circuit's recent decision in *Abdul Latif* cannot be understated:

- First, it departs from the holding of other federal courts of appeal that have dealt with this issue, including the Second and Fifth Circuits.
- *Sec*ond, it potentially adds to the arsenal of international litigation practitioners by allowing them to use Section 1782 in the ever-expanding arena of international arbitration.
- Third, and perhaps most importantly, the Sixth Circuit's well-reasoned opinion may persuade other federal courts of appeal that have not squarely addressed the issue, to adopt the reasoning in *Abdul Latif.* For example—and of particular relevance to Florida—the Eleventh Circuit, in *Application of Consorcio Ecuatoriano de Telecomunicaciones*, appears to have been leaning toward a similar result, but ultimately left the question unanswered. See *Application of Consorcio Ecuatoriano de Telecomunicaciones v. JAS Forwarding (USA),* 747 F.3d 1262, 1270 n.4 (11th Cir. 2014).

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